21 Mo. 532; *Watson* v. *Bissell* (1858) 27 Mo. 220; *Creighton* v. *Hoppis* (1884) 99 Ind. 369; cf. *Travis* v. *Barkhurst* (1853) 4 Ind. 171.

It has been urged, that the declarations are inadmissible under this theory unless the conduct to characterize which they are offered is "equivocal or incomplete as a legal act." Wigmore, Evid. § 1774. Of course if the conduct apart from the utterance is a complete legal act in itself then the utterance cannot strictly form a part of that act, but so long as the utterance characterizes the conduct it would seem that the act is incomplete without it. Equivocality of the conduct, therefore, should become material in principle only in determining whether evidence of the utterance is cumulative, and the conduct should be held unequivocal when there can be no reasonable doubt as to its significance. The necessity of equivocality is not recognized by many text writers, 1 Greenleaf, Evid. (15th ed.) §§ 109, 110; Taylor, Evid. § 580 *et seq.;* Best, Evid. § 408 *et seq.,* and the cases seem to disregard it. *Lund* v. *Tyngsborough* (Mass. 1851) 9 Cush. 36, 42; *Wright* v. *Tatham* (1838) 7 A. & E. 313, 361. This may be due to the fact that in this class of cases the conduct is usually equivocal. See cases cited *supra.* But those decisions which touch upon the point either merely state that the conduct was ambiguous and needed explanation, *Cooper* v. *State* (1879) 63 Ala. 80; *Creighton* v. *Hoppis, supra; Lewis* v. *Burns* (1895) 106 Cal. 381 or were cases where the conduct involved was a complete legal act by itself apart from the utterance which accompanied it. Semble, *Shuck* v. *Vanderventer* (Ia. 1854) 4 Greene 264, 265. Thus it would seem that although conduct is otherwise well characterized, the utterance which goes to make up the relevant act should nevertheless be admitted, even though the practical consequence is that the utterance is useful chiefly as hearsay, unless barred by the cumulative rule.

FEDERAL POWER UNDER THE ADMIRALTY AND INTERSTATE COMMERCE CLAUSES.—Two conditions would seem necessary to give Federal courts jurisdiction under the Interstate Commerce clause of the United States Constitution: first, Congressional legislation; second, legislation regulative of interstate commerce. The first requisite, enforced in the days of Chief Justice Marshall, *Wilson* v. *Black etc. Co.* (1829) 2 Pet. 245, has been modified to the extent that, as to matters in which uniformity of legislation is necessary from the nature of the subject, the power of Congress is exclusive, and therefore State legislation upon such subjects is unconstitutional *per se,* whereas as to other matters the power of Congress is only paramount. *Cooley* v. *Board of Wardens* (1851) 12 How. 299; *Robbins* v. *Shelby Taxing District* (1886) 120 U. S. 489. The second requisite has been liberally construed so as to include not only the regulation of "commerce" in its narrow sense, but also of the conditions surrounding it. *Leovy* v. *United States* (1900) 177 U. S. 621. Since commerce includes navigation, *Gibbons* v. *Ogden* (1824) 9 Wheat. 1, the determination of what surrounding conditions are proper subjects of the power of Congress has necessitated a definition of "navigable waters of the United States." It has been decided that such water is that which may in its ordinary condition be made practically useful for the prosecution of interstate commerce,

Leovy v. *United States, supra; Cardwell* v. *American Bridge Co.* (1885) 113 U. S. 205, and over it Congress has unquestioned power, either exclusive or paramount, to legislate with regard to all matters which directly affect interstate commerce there carried on. *Lake Shore etc. Ry.* v. *Ohio* (1896) 165 U. S. 365.

From the earliest days the constitutional clause, providing that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction, has been held to confer exclusive jurisdiction upon the Federal Government, *Martin* v. *Hunter's Lessee* (1816) 1 Wheat. 304, 335; *Houston* v. *Moore* (1820) 5 Wheat. 1, 49, and by necessary implication, to authorize legislation within this field. *United States* v. *Bevans* (1818) 3 Wheat. 336, 386. *In re Garnett* (1891) 141 U. S. 1. The field, however, is confined to the boundaries established in this country at the time of the adoption of the Constitution, *Waring* v. *Clark* (1847) 5 How. 441, 457; *The Genesee Chief* (1851) 12 How. 447; *The Belfast* (1868) 7 Wall. 624, or at most by those generally recognized to-day by the nations. Hughes, Admiralty § 114. Territorially the admiralty and maritime jurisdiction was at first held to extend only to tidal waters, *The Thomas Jefferson* (1825) 10 Wheat. 428, but in *The Genesee Chief,* supra, it was made clear that the true test was the public navigability of the water in question. See also 4 COLUMBIA LAW REVIEW 131. But public navigability and capacity for interstate commerce are substantially coextensive, so that the waters affected by the constitutional clauses under discussion would seem to be practically identical. The identity of jurisdiction, however, seems confined almost entirely to that of territory. But this does not appear strange when one considers that one clause grants primarily the power to establish new rights and duties for the purpose of regulating commerce, while the grant of the other is primarily the power to apply, and to legislate with regard to, remedies for the infringement of already recognized rights and duties.

In the light of this discussion a recent Federal decision would seem of doubtful soundness, in which it was held that a Congressional statute requiring the approval of the Secretary of War of all structures tending to obstruct navigable waters of the United States, and authorizing the Attorney-General to secure an injunction against such structures, was justified under both the commerce and admiralty clauses. *United States* v. *Banister Realty Co.* (1907) 155 Fed. 583. In the first place, its very wording shows it to be regulative of commerce in the broader acceptation of that phrase, while it is also creative of new rights and duties, and not merely regulative of those already established, and would, therefore, be clearly constitutional under the commerce clause, while its classification as an admiralty regulation would justify the inquiry whether it did not enlarge that field unconstitutionally. Decided cases make it plain that the right of the State to have waters kept clear has been uniformly conceived of as one connected with the public interest in commerce, and not involved in admiralty jurisdiction. *Woodman* v. *Kilburn Mfg. Co.* (Fed. 1867) 1 Biss. 546; *United States* v. *Duluth* (Fed. 1871) 1 Dill. 469; *United States* v. *Milwaukee etc., Ry. Co.* (Fed. 1873) 5 Biss. 420. Moreover the remedy by injunction, which is authorized by the statute, is the same which was recognized as appro-

priate in these cases, but is one apparently unknown to admiralty law. Finally, there is no advantage to be gained by so stretching the meaning of the admiralty clause as to justify the statute in question, for the waters which may be affected by the commerce clause are as extensive as those affected by the admiralty clause, and the right to legislate under the former is much more extensive than that under the latter.

NATURE OF RECEIVERS' CONTRACTS OF SALE.—The English and American courts agree that a receiver in making contracts cannot be considered as the agent of the defendant. *Burt* v. *Bull* [1895] L. R. 1 Q. B. 276; *Riggs* v. *Pursell* (1876) 66 N. Y. 193. The English courts hold further that "it is of course impossible to suppose that the relation of principal and agent exists between" the receiver and the court, and that it must therefore be the intention that the receiver contracts on his own responsibility, "because otherwise no one would be responsible for his acts." *Burt* v. *Bull, supra.* The American courts almost uniformly state that a receiver contracts as agent of the court, *Lehigh etc. Co.* v. *Central R. R. of N. J.* (1882) 35 N. J. Eq. 426; *People* v. *Open Board etc. Co.* (1883) 92 N. Y. 98, and that a contract is entered into between the court and the purchaser. If the court be conceived of as an entity capable of holding property in trust, Laws N. Y. 1893 c. 701 § 1; *McCosker* v. *Brady* (N. Y. 1846) 1 Barb. Ch. 329. 343, no reason appears why it may not have the capacity to contract. That one of the parties must adjudicate on its terms and in case of breach award damages, *Wampler* v. *Shipley* (Md. 1831) 3 Bland 182, is perhaps not an insuperable objection to the theory of the existence of a contract, as the court is of course bound to determine in accordance with the law. Nor the fact that the purchaser might be powerless to compel performance by the court; for this would simply be due to the failure of the court to exercise its ordinary judicial functions, and not to the lack of any binding quality in the contract under the rules of law. The public policy which might refuse to uphold a contract where one of the parties to it is the arbitrator, would doubtless not extend to the case where such a party is a court, and perfectly disinterested. Such a contract would exist, nevertheless, only in abstract logic, and is entirely without the scope of ordinary contracts.

Although damages have sometimes been awarded as if a contract actually existed, *People* v. *Open Board etc. Co., supra; Drake* v. *Goodridge* (Fed. 1869) 6 Blatchf, 531, the general attitude of the courts, and the decisions, are inconsistent with the contract conception. Sales are set aside at the request of the purchaser where the latter would have no right to demand relief under the principles of equity as applied to ordinary contracts. *Fisher* v. *Hersey* (1879) 78 N. Y. 387; *Clayton* v. *Glover* (N. C. 1857) 3 Jones Eq. 371; 3 COLUMBIA LAW REVIEW 593. And although it is generally held that mere inadequacy of price is not a sufficient ground for setting aside, *Strong* v. *Catton* (1853) 1 Wis. 471, 496, yet if any other ground appear which makes such action equitable, this ground is seized upon, and sales are set aside, after confirmation, and over the objection of the purchaser, under circumstances which would not warrant a court of equity in cancelling a contract between private parties. *Mound City Life Ins. Co.* v. *Hamilton*